No. 91-636

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FORT GRATIOT SANITARY LANDFILL, INC.,
Petitioner,

-vs.-

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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February 14, 1992

Petition for Certiorari filed October 12, 1991
Certiorari granted January 10, 1992

Question Presented

Does a state statute which prohibits the disposal within a county in the state of any solid waste which has been generated outside the county, including all out-of-state waste, impermissibly "discriminate against interstate commerce" within the meaning of this Court's decisions in *Wyoming* v. *Oklahoma*, 60 U.S.L.W. 4119, 4124 (1992), *Maine* v. *Taylor*, 477 U.S. 131, 138 (1986), and *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978)?

Parties To The Proceeding

In addition to the Petitioner * and Respondent listed in the caption, the following are also Respondents in this action: David Hales, Director of Michigan Department of Natural Resources; St. Clair County Health Department; Jon B. Parsons, Director of St. Clair County Health Department; St. Clair County Metropolitan Planning Commission, and Gordon Ruttan, Director; St. Clair County Solid Waste Planning Committee and Peg Clute, Chairperson.

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* Pursuant to Rule 29.1 of this Court, Petitioner states as follows: A controlling interest in Petitioner, Fort Gratiot Sanitary Landfill, Inc., is owned by FGSLI Investment Corporation. A controlling interest in FGSLI Investment Corporation is owned by Trinity Capital Corporation. Trinity Capital Corporation is wholly-owned by Trinity Holdings Corporation, a controlling interest in which is owned by Century Holdings Ltd. Petitioner, Fort Gratiot Sanitary Landfill, Inc. has no subsidiaries.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

PAGE

Statutes

Bills

Regulations

The United States Constitution

Other Authorities

PAGE

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Opinions Below [1]

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. 1a) [2] affirming the decision of the United States District Court for the Eastern District of Michigan is reported at 931 F.2d 413 (6th Cir. 1991). The order of the United States Court of Appeals for the

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[1] This action was originally commenced by Petitioner *sub nom* "Bill Kettlewell Excavating, Inc."; the name of Petitioner was changed by an amendment to its certificate of incorporation which was filed with the Secretary of State of Michigan on August 2, 1989.

[2] Citations herein to material printed in the Appendices to the Petition for Writ of Certiorari to the United States Court of Appeals in this case appear as "Pet. —— a". Citations to the Brief in Opposition to the Petition for a Writ of *Certiorari* which was filed by the Michigan Department of Natural Resources and its Director appear as "State Brief in Opposition at ——" and citations to the Brief in Opposition to such Petition which was filed by the St. Clair County Respondents appear as "County Brief in Opposition at —."

Sixth Circuit denying Petitioner's Petition for Rehearing with Suggestion for Rehearing En Banc (Pet. 22a) is reported at 1991 U.S. App. Lexis 17593, No. 90-1361 (6th Cir. 1991). The memorandum opinion and order of the United States District Court for the Eastern District of Michigan (Pet. 12a) is reported at 732 F. Supp. 761 (E.D. Mich. 1990).

Jurisdiction

The order of the United States Court of Appeals for the Sixth Circuit was entered on May 1, 1991, affirming the March 2, 1990 order of the United States District Court for the Eastern District of Michigan. The order of the United States Court of Appeals for the Sixth Circuit denying Petitioner's Petition for Rehearing with Suggestion for Rehearing En Banc was entered on July 16, 1991. A Petition for a Writ of *Certiorari* to review the judgment of the Court of Appeals was filed on October 12, 1991. The Petition for a Writ of *Certiorari* was granted by the Court on January 10, 1992. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

Article I, Section 8 of the Constitution of the United States provides in pertinent part as follows:

> The Congress shall have Power . . . To Regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .

Section 13a of the Michigan Solid Waste Management Act, Mich. Comp. Laws Ann. § 299.413a (1991 Supp.), provides in pertinent part as follows:

> A person shall not accept for disposal solid waste or municipal solid waste incinerator ash that is not generated in the county in which the disposal

> area is located unless the acceptance of solid waste or municipal solid waste incinerator ash that is not generated in the county is explicitly authorized in the approved county solid waste management plan.

Section 30(2) of the Michigan Solid Waste Management Act, Mich. Comp. Laws Ann. § 299.430(2) (1991 Supp.), provides in pertinent part as follows:

> In order for a disposal area to serve the disposal needs of another county, state or country, the service, including the disposal of municipal solid waste incinerator ash, must be explicitly authorized in the approved solid waste management plan of the receiving county.

Statement of the Case

Sections 13a and 30(2) of the Michigan Solid Waste Management Act (the "Waste Importation Restrictions") were adopted in December 1988 and became effective immediately. By their express terms, such sections prohibit the acceptance of out-of-county waste, including all out-of-state waste, at any privately or publicly-owned landfill within any county in the State of Michigan unless such acceptance is explicitly authorized in an approved county solid waste management plan.[3] At the time that the Waste Importation Restrictions became effective, and at all times thereafter, the solid waste management plan of St. Clair County, Michigan, did not authorize the ac-

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[3] In order to be approved under the Michigan Solid Waste Management Act, a county solid waste management plan must be adopted by the county board of commissioners and approved by the governing bodies of not less than 67% of the municipalities within such county and the director of the Michigan Department of Natural Resources. Mich. Comp. Laws Ann. §§ 299.427(f), 299.429 (1984); Michigan Comp. Laws Ann. §§ 299.428(2), 299.428(4) (1991 Supp.).

ceptance of out-of-state waste for disposal at landfills within the County.

Petitioner commenced this action in March, 1989, in the United States District Court for the Eastern District of Michigan, Southern Division, seeking a declaratory judgment that the Waste Importation Restrictions violated the Commerce Clause of the Constitution of the United States because they impermissibly discriminated against the disposal of waste generated out of state, as compared to waste generated in county, at privately-owned landfills [4] in St. Clair County.[5] The District Court had jurisdiction pursuant to 28 U.S.C. § 1331.

The District Court denied Petitioner's request for a declaratory judgment that the Waste Importation Restrictions violated the Commerce Clause of the Constitution. In so doing, the District Court noted that the prior decisions of this Court required it to determine whether the Michigan Solid Waste Management Act, "either on its

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[4] This case does not raise the issue of whether the State or its counties may restrict the acceptance of out-of-state waste at county or state-owned landfills. *See City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 627 n.6 (1978). However, in light of decisions of the Court since *City of Philadelphia* v. *New Jersey*, it seems clear that a state or county-owned landfill could prohibit the disposal therein of out-of-state waste. *See* note 32 *infra*.

[5] Petitioner also claimed before the District Court and the Court of Appeals that a refusal by the St. Clair County authorities to amend the County's solid waste management plan so as to authorize the importation of out-of-state waste violated the Commerce Clause and the Fourteenth Amendment Due Process Clause of the Constitution, both of which claims were rejected by both courts. In its Petition for Writ of *Certiorari*, Petitioner did not seek review of the denial of its claims that such refusal was unconstitutional. Instead, Petitioner only sought review of the denial of its claim that the State legislation, both directly and by incorporating the County's plan, impermissibly discriminated against interstate commerce.

face or in its effect discriminates against interstate commerce, or whether the [Michigan Solid Waste Management Act] regulates evenhandedly, with only incidental effects on interstate commerce." 732 F. Supp. 761, 764 (Pet. 17a). The District Court then stated that "determination of a statute's facial validity requires an evaluation of whether the statutory language expresses favorable treatment to in-state entities," *id.* at 764 (Pet. 17a), and it concluded that the Michigan Solid Waste Management Act, because it applied "equally to Michigan counties outside the county . . . as well as to out-of-state entities," did not discriminate against interstate commerce on its face. *Id.* at 764 (Pet. 18a). The District Court then held that the Waste Importation Restrictions did not discriminate, in practical effect, against interstate commerce because the Michigan Solid Waste Management Act did not impose a "flat prohibition against the importation of out-of-state waste into Michigan's landfills," but rather "grants each county discretion in accepting or denying importation of waste from any outside source, including other counties within the State." *Id.* at 764 (Pet. 18a).

Based on such analysis, the District Court concluded that the Michigan Solid Waste Management Act imposed only "incidental effects upon interstate commerce, and may therefore be upheld unless the burden imposed is clearly excessive in relation to the putative local benefits.'" 732 F. Supp. at 765 (Pet. 18a) (citing *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Noting that the Michigan Solid Waste Management Act was adopted for various cited putative local benefits and that Petitioner had not posited that it was a "practical impossibility" for any out-of-state generator to utilize Michigan's landfills, the District Court, applying the *Pike* v. *Bruce Church* test, concluded that the "incidental effect on inter-

state commerce imposed by the [Michigan Solid Waste Management Act] is not clearly excessive in relation to the benefits derived by Michigan from the statute." *Id.* at 765 (Pet. 19a). The court therefore held that the Waste Importation Restrictions did not violate the Commerce Clause of the United States Constitution.

On appeal, the Court of Appeals rejected Petitioner's contention that the Waste Importation Restrictions discriminated against out-of-state waste, noting that the Michigan Solid Waste Management Act "does not treat out-of-county waste from Michigan any differently than waste from other states." 931 F.2d 413, 417 (Pet. 9a). After apparently approving the determination of the District Court that the Michigan Solid Waste Management Act did not discriminate in practical effect against out-of-state waste because it granted each county discretion to accept or reject such waste, the court held that the District Court had properly determined that the Michigan Solid Waste Management Act " 'imposes only incidental effects upon interstate commerce, and may therefore be upheld' unless clearly excessive as compared to local benefits under *Pike*." *Id.* at 417-18 (Pet. 10a). Noting that the Michigan Solid Waste Management Act provided for a "comprehensive plan for waste disposal, through which appropriate planning for such disposal can result," *id.* at 418 (Pet. 10a), the court concluded "that the attack on the facial constitutionality of the Michigan statute in question must fail." *Id.* at 418 (Pet. 10a).

SUMMARY OF ARGUMENT

A. 1. Under the established jurisprudence of this Court, state legislation which clearly discriminates against interstate commerce will be subjected to "strict scrutiny," *Wyoming* v. *Oklahoma*, 60 U.S.L.W. 4119, 4124 n.12 (1992), and will be struck down if the state does not

sustain the burden of demonstrating both that the legislation serves a legitimate local purpose and that such purpose could not be served as well by available nondiscriminatory means. *See, e.g., Maine* v. *Taylor*, 477 U.S. 131, 134 (1986). Moreover, if the legislation amounts to simple economic protectionism, it will be subject to a virtual per se rule of invalidity. *Wyoming* v. *Oklahoma*, 60 U.S.L.W. at 4124. Both the strict scrutiny test and the virtual per se rule subsumed therein are based upon a fundamental constitutional principle, which this Court has repeatedly and consistently enforced, that a state may not impose an embargo upon the importation of articles of commerce from a sister state, except in the narrow circumstances in which a quarantine is warranted. *See, e.g., Wyoming* v. *Oklahoma; City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978). Any such embargo cannot stand because it violates the "ultimate" constitutional principle that "one state in its dealings with another cannot place itself in a position of economic isolation." *Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511, 527 (1935).

2. The Waste Importation Restrictions of the Michigan Solid Waste Management Act impose a discriminatory embargo upon the importation of out-of-state waste for disposal at privately-owned landfills in St. Clair County, Michigan, while allowing identical waste originating from within the County to be deposited in such landfills. Nonetheless, the courts below held that the Waste Importation Restrictions do not discriminate against interstate commerce and, therefore, are not subject to the strict scrutiny test since waste generated in other counties in Michigan is subject to the same proscription. By holding that the Waste Importation Restrictions do not discriminate against interstate commerce because they also discriminate against some in-state commerce, the courts below ignored

the teachings of this Court's decisions in *Dean Milk* v. *City of Madison*, 340 U.S. 349 (1951), and other cases, which stand for the necessary principle that "it is immaterial" for purposes of determining whether legislation discriminates against interstate commerce "that [other in-state commerce] is subject to the same proscription as that moving in interstate commerce." 340 U.S. at 354 n.4. The principle espoused by the courts below, that state legislation which excludes interstate commerce from local areas will not be deemed to discriminate against interstate commerce so long as other non-local, in-state commerce is subject to the same prohibitions, cannot stand because it permits the states, through localized discrimination by counties or newly-created subdivisions, to evade the strictures of the Commerce Clause and because it is completely inconsistent with the theory of our Constitution that "the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin* v. *G.A.F. Seelig*, 294 U.S. at 523. The courts below should have held that the Waste Importation Restrictions do discriminate against interstate commerce, and they should have subjected the Waste Importation Restrictions to the strict scrutiny test.

B. There are no exceptions to the strict scrutiny test which would render it inapplicable to the Waste Importation Restrictions. Respondents' apparent suggestion that the Waste Importation Restrictions are not subject to the strict scrutiny test because they were motivated by public health considerations does not itself withstand scrutiny; a presumably legitimate goal cannot be accomplished by the impermissible means of imposing a discriminatory embargo upon articles of commerce from out of state. *See, e.g., Wyoming* v. *Oklahoma*, 60 U.S.L.W. at 4125; *City of Philadelphia* v. *New Jersey*, 437 U.S. at

627. Moreover, contrary to Respondents' contentions, no applicable special rule for natural resources exists which would permit the Waste Importation Restrictions to escape review under the strict scrutiny test. *See, e.g., New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 338 (1982). In addition, while not asserted by Respondents, the discrimination effected by the Waste Importation Restrictions cannot be justified on the basis of the narrow exception for necessary quarantines. Under the jurisprudence of this Court, quarantines may only be imposed upon foreign articles of commerce when essential to prevent the importation or spread of disease or pestilence, *see, e.g., Rasmusssen* v. *Idaho*, 181 U.S. 198 (1901), and nothing in the record suggests that such an embargo is essential in the instant case; indeed, the Michigan Solid Waste Management Act and federal law both set forth minimum criteria which provide assurance that solid waste landfills can be operated in a manner that "ensure[s] the protection of human health and the environment." 56 Fed. Reg. 50978, 51017 (to be codified as 40 C.F.R. § 258.1(a)).

C. The Waste Importation Restrictions fail the strict scrutiny test and cannot stand. First, because they were *designed* to impose an embargo upon out-of-state waste for the economic benefit of the citizens of St. Clair County, at the expense of citizens of other states, the Waste Importation Restrictions amount to simple economic protectionism. *See New Energy Co. of Indiana* v. *Limbach*, 486 U.S. 269, 273 (1988). Moreover, because the State sought to achieve its legislative goal through the clearly impermissible means of a discriminatory embargo, that legislative goal is inherently illegitimate. Finally, no showing has been made in this case that the purpose of the Waste Importation Restrictions could not be served as well by available nondiscriminatory means, such as by

reducing the flow of *all* solid waste into Michigan's landfills, *see City of Philadelphia* v. *New Jersey*, 437 U.S. at 626, or by creating additional state or county-owned landfill capacity which could be reserved for the exclusive benefit of local citizens under the market participation exception to the strictures of the Commerce Clause.

ARGUMENT

I.

THE WASTE IMPORTATION RESTRICTIONS DISCRIMINATE AGAINST INTERSTATE COMMERCE.

A. State Statutes Which Discriminate Against Interstate Commerce Are Subject To Strict Scrutiny.

The basic principles to be applied in determining whether a state statute which burdens interstate commerce violates the Commerce Clause have long been established. As this Court stated in *Pike* v. *Bruce Church, Inc.*:

> Where the statute regulates *evenhandedly* to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

397 U.S. 137, 142 (1970) (emphasis added). On the other hand, as this Court explained in *Maine* v. *Taylor*:

> [O]nce a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means.

477 U.S. 131, 138 (1986) (*citing Hughes* v. *Oklahoma*, 441 U.S. 322, 336 (1979)).

The particular infirmity under the Commerce Clause of state statutes which clearly discriminate against interstate commerce has most recently been emphasized by this Court in *Wyoming* v. *Oklahoma*, 60 U.S.L.W. 4119 (1992), in which this Court stated:

> It is long-established that, while a literal reading evinces a grant of power to Congress, the Commerce Clause also directly limits the power of the States to discriminate against interstate commerce. *See New Energy Co. of Indiana* v. *Limbach*, 486 U.S. 269, 273 (1988) (citing *Hughes* v. *Oklahoma*, 441 U.S. 322, 326 (1979); *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 534-535 (1949); *Welton* v. *Missouri*, 91 U.S. 275 (1876)). "This 'negative' aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co., supra*, at 273-274; *see also Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 270-273 (1984); *H.P. Hood & Sons, supra*, at 532-533. When a state statute clearly discriminates against interstate commerce it will be struck down, *see, e.g., New Energy Co., supra*, unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism, *see, e.g., Maine* v. *Taylor*, 477 U.S. 131 (1986). Indeed, when the state statute amounts to simple economic protectionism, a "virtually *per se* rule of invalidity" has applied. *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978).

60 U.S.L.W. 4119, 4124 (1992)(footnote omitted).

Both the strict scrutiny test, *Wyoming* v. *Oklahoma*, 60 U.S.L.W. at 4124 n.12, and the virtual per se rule subsumed therein are based upon a fundamental constitutional principle established in a line of nine cases dating back to 1877 wherein the Court has consistently held that a state may not impose a discriminatory embargo[6] upon the importation of articles of commerce from a sister state except in the narrow circumstance in which a quarantine is warranted. *See Wyoming* v. *Oklahoma*, 60 U.S.L.W. 4119 (1992) (holding unconstitutional, under the Commerce Clause, an Oklahoma statute which required Oklahoma coal-fired utilities to burn a mixture containing at least 10% Oklahoma-mined coal); *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978) (holding unconstitutional, under the Commerce Clause, a New Jersey statute prohibiting the disposal within New Jersey of out-of-state solid waste); *Great Atlantic & Pacific Tea Co., Inc.* v. *Cottrell*, 424 U.S. 366 (1976) (holding unconstitutional, under the Commerce Clause, a Mississippi statute prohibiting out-of-state milk meeting Mississippi health standards from being sold in Mississippi unless the exporting state was party to a reciprocity agreement with Mississippi); *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361 (1964) (holding unconstitutional, under the Commerce Clause, a Florida statute requiring milk processors in a four-county district to purchase all available local milk for their high-priced needs before purchasing any milk from outside such district, including

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[6] For purposes of this brief, the phrase "discriminatory embargo" is intended to refer to a prohibition upon the importation of articles of commerce originating out of state which is not matched by a similar prohibition upon the internal movement of like articles of commerce originating in state. The phrase is not intended to include discrimination by the state as a market participant. *See* note 32 *Infra*.

out-of-state milk, for such needs); *Dean Milk* v. *Madison*, 340 U.S. 349 (1951) (holding unconstitutional, under the Commerce Clause, a Madison, Wisconsin ordinance prohibiting the sale in such city of milk pasteurized more than five miles from the city's center); *Edwards* v. *California*, 314 U.S. 160 (1941) (holding unconstitutional, under the Commerce Clause, a California statute imposing criminal penalties upon individuals bringing non-resident indigents into the state); *Brimmer* v. *Rebman*, 138 U.S. 78 (1891) (holding unconstitutional, under the Commerce Clause, a Virginia statute banning the sale of meat more than one hundred miles from the place where the animal was slaughtered); *Minnesota* v. *Barber*, 136 U.S. 313 (1890) (holding unconstitutional, under the Commerce Clause, a Minnesota statute forbidding meat from being sold in state unless the animal was inspected in state within twenty-four hours of being slaughtered); and *Hannibal and St. Joseph R.R. Co.* v. *Husen*, 95 U.S. 465 (1877) (holding unconstitutional, under the Commerce Clause, a Missouri statute prohibiting the importation of Texas, Mexican and Indian cattle between March 1 and December 1 of each year).[7]

This basic constitutional principle that a state may not impose a discriminatory embargo upon articles of commerce originating in a sister state, except where a quarantine is necessary, arises out of the very purpose

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[7] In addition, the Court has also repeatedly held that a state may not impose a discriminatory tariff upon the importation of articles of commerce from a sister state. *See, e.g., Bacchus Imports, Ltd.* v. *Dias* 468 U.S. 263 (1984); *Armco Inc.* v. *Hardesty*, 467 U.S. 638 (1984); *D.E. Foote & Co.* v. *Stanley*, 232 U.S. 494 (1914); *Voight* v. *Wright*, 141 U.S. 62 (1891); *Walling* v. *Michigan*, 116 U.S. 446 (1885); *Guy* v. *City of Baltimore*, 100 U.S. 434 (1880); and *Welton* v. *Missouri*, 91 U.S. 275 (1875).

of the Commerce Clause. As Justice Cardozo stated in *Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511, 522 (1935):

> We are reminded in the opinion below that a chief occasion of the commerce clause was "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation." Farrand, Records of the Federal Convention, vol. II, p. 308; vol. III, pp. 478, 547, 548; The Federalist, No. XLII; Curtis, History of the Constitution, vol. 1, p. 502; Story on the Constitution, § 259. If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.[8]

While some commentators have questioned the historical underpinnings,[9] and even the existence,[10] of the

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[8] As one scholar has noted, the "concept-of-union objection" to state protectionism "is so obvious that it is easily overlooked. State protectionism is unacceptable because it is inconsistent with the very idea of political union, even a limited federal union. Protectionist legislation is the economic equivalent of war. It is hostile in its essence." Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1113 (1986).

[9] The "conventional wisdom" about the origins of the Commerce Clause, as accurately summarized by Professor Regan, is that "the people who wrote our actual Constitution in 1787 were well aware" of the danger of state protectionism. "They saw states enacting protectionist restrictions; they saw other states retaliating; and they feared not merely for the economic health, but also and even more for the political viability of the infant United States." Regan, *The Supreme Court and State Protectionism*, *op. cit. supra*, at 1114. Some modern commentators have argued

[Footnote continued on following page]

dormant (or negative) Commerce Clause, the fact is that since 1873, the year in which this Court first formally

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[Footnote continued from preceding page]

that protectionism and retaliation were virtually non-existent during the years between the end of the Revolutionary War and the year of the Constitutional Convention, 1787. *See* Regan, *op. cit. supra*, at 1114 n.55 (discussing the arguments of Edmund Kitch and William Zornow). But the conventional wisdom is supported by respected secondary sources, *see, e.g.*, J. McMaster, I HISTORY OF THE PEOPLE OF THE UNITED STATES 394-397, 404-406 (1911); J. Fiske, THE CRITICAL PERIOD OF AMERICAN HISTORY 1783-1789 144-147, 262-63 (1888); R. Morris, THE FORGING OF THE UNION 1781-1789 148-151 (1987); A. Nevins, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION 1775-1789 547-564 (1924), and the suggestion that protectionism was virtually non-existent under the Articles of Confederation appears to be belied by reliable primary sources. For example, in 1784, Connecticut adopted legislation which imposed a duty upon (i) articles of commerce which were imported from foreign countries through the ports of her sister states, but not upon like articles imported from foreign countries directly to Connecticut, and (ii) upon various specific articles of commerce, including coffee, tea, chocolate, sugar and paper, which were imported from and manufactured in her sister states. An Act for Levying and Collecting a Duty on Certain Articles of Goods Wares and Merchandize Imported Into This State by Land or Water, enacted by the Connecticut Governor Council and Representatives in General Court Assembled at its May 1784 session. *The Public Records of the State of Connecticut for the Years* 1783 *and* 1784 (1943). In response, Governor James Bowdoin of Massachusetts protested to the Governor of Connecticut:

> But should [foreigners] discover disposition in the United States to treat each other as foreigners . . . , will they not enter [their] hopes, and will not those hopes be too well grounded, that an undue attachment to separate interests in individual States may be productive of cold indifference towards each other, of total disregard, of jealousy, animosity and even hatred?

Letter from Governor James Bowdoin to Governor of Connecticut, July 27, 1785, Bancroft Collection, New York Public Library. The Governor's letter continued on to protest the imposition of duties upon articles manufactured by the citizens of Massachusetts:

[Footnote continued on following page]

gave effect to the negative aspects of the Commerce Clause, this Court has never upheld a state statute which imposed

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[Footnote continued from preceding page]

> This must be considered the more exceptionable, in as much as for the sake of cementing the Union, which is the true policy of the Confederate Commonwealth, our laws exact no duties on the manufacture of any of the United States, and in regard to Commerce, their Citizens respectively stand upon a footing with our own.

The next day, Governor Bowdoin sent a letter to the governors of the several states in which he expressed his view that "it is much to be desired that Congress may be vested with a well *guarded* Power to regulate the Trade of the United States." Circular Letter of Governor Bowdoin to the Governors of the States, July 28, 1785, Bancroft Collection, New York Public Library. Perhaps in response, Rufus King, who subsequently became a delegate to the Constitutional Convention, wrote to Governor Bowdoin on May 18, 1786, "[o]ne truth is most obvious, that the happiness, prosperity and safety of our Country must depend upon the United Systems and exertions of the several States and not on the separate arrangements of individual States . . . ." Letter from Rufus King to Governor Bowdoin, May 18, 1786, Bancroft Collection, New York Public Library.

That Connecticut's discriminatory duty was not unique is evidenced by James Madison's contemporaneous observation that:

> The practice of many States in restricting the commercial intercourse with other States, and putting their productions and manufactures on the same footing with those of foreign nations, though not contrary to the federal articles, is certainly adverse to the spirit of the Union, and tends to beget retaliating regulations, not less expensive and vexatious in themselves than they are destructive of the general harmony.

Observations by J.M., Vices of the Political System of the U. States, April, 1787, printed in II THE WRITINGS OF JAMES MADISON, 1783-1787 361, 363 (Hunt, Gaillard ed. 1901). These and other "rival, conflicting and angry regulations" of commerce of the several States are also noted in J. Madison, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 14 (Koch Ed., 1966).

It should also be noted, of course, that Hamilton cited the potential dangers of commercial rivalry amongst the States as being reasons for ratifying the Constitution. *See* THE FEDERALIST, Nos. 7, 11.

[10] *See* the articles cited in note 13, *infra*.

a discriminatory embargo upon the importation of articles of commerce originating in a sister state, except in cases involving necessary quarantines.[11] Moreover, since 1873, no Justice of the Court has even suggested in any opinion written in a Commerce Clause case, that the states are, or should be, free to impose a discriminatory embargo upon articles of commerce coming from a sister state, except in the narrow circumstances where a quarantine is justified.[12] In light of this jurisprudence, as well as the fact that even those who question the existence of a dormant Commerce Clause acknowledge that any such embargo should be

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[11] *The Case of the State Freight Tax*, 15 Wall. 232 (1873), was the first case in which a state statute was struck down as violative of the dormant Commerce Clause. Professor Schwartz, after tracing its origins to Daniel Webster's argument in *Gibbons* v. *Ogden*, 9 Wheat. 1 (U.S. 1824), suggests that the dormant Commerce Clause was first adopted in *Cooley* v. *Board of Port Wardens*, 12 How. 299 (U.S. 1852). *See* B. Schwartz, FROM CONFEDERATION TO NATION 18-19 (1973). In this connection, it is noteworthy that even in 1880 Justice Harlan was able to conclude, based upon a review of the Court's prior decisions, that:

> In view of these and other decisions of this court, it must be regarded as settled that no State can, consistently with the Federal Constitution, impose upon the products of other States brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory.

Guy v. *Baltimore*, 100 U.S. 434, 439 (1880).

[12] For a discussion of the constraints which individual justices have suggested should be imposed upon the scope of the dormant Commerce Clause, *see* Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. Rev. 43, 50 n.52 and 127 n.495 (1988). Professor Collins has noted that Justice Daniel was the only member of the Taney Court who consistently opposed any implicit Commerce Clause limits on state laws. *See* Collins, *op. cit. supra* at 49 n.46. The quarantine cases are discussed *infra* at Section II C. of this Brief.

prohibited by the Privileges and Immunities Clause,[13] it should be indisputable that any such embargo cannot stand because it contravenes an accepted "ultimate . . . principle that one state in its dealings with another may not place itself in a position of economic isolation." *Baldwin* v. *G.A.F. Seelig, supra,* at 527.

B. The Waste Importation Restrictions Discriminate Against Interstate Commerce Even Though Some Intrastate Commerce Is Subject To The Same Proscription.

The Waste Importation Restrictions, both directly and by incorporating the existing St. Clair County solid waste management plan, impose a discriminatory embargo on out-of-state solid waste. They prohibit the importation of out-of-county waste, including all out-of-state waste, into any county in the state unless such county explicitly authorizes the acceptance of such waste in its solid waste management plan; and, in the case of St. Clair County, they allow solid waste generated in county to be accepted for disposal at privately-owned landfills in the County but prohibit otherwise identical solid waste generated out of county, including solid waste generated out of state, from being accepted for disposal at such privately-owned landfills.[14] Consequently, it would seem to be obvious that

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[13] *See* Redish & Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism,* 1987 Duke L.J. 569, 605-612 (1987); Eule, *Laying the Dormant Commerce Clause to Rest,* 91 Yale L.J. 425, 446-455 (1982); Black, *Perspective on the American Common Market,* in REGULATION, FEDERALISM, AND INTERSTATE COMMERCE 59, 65 (A. Tarlock ed. 1981).

[14] Under the Michigan Solid Waste Management Act, the County could amend its present exclusionary solid waste manage-

[Footnote continued on following page]

the Waste Importation Restrictions violate the basic principle that a state cannot impose a discriminatory embargo upon the importation of articles of commerce from a sister state, except where a quarantine is necessary. Nonetheless, both the District Court and the Court of Appeals determined that the Michigan Solid Waste Management Act does not "discriminate against interstate commerce" because, as stated by the Court of Appeals, the Michigan Solid Waste Management Act "does not treat out-of-county waste from Michigan any differently than waste from other states." 931 F.2d at 417 (Pet. 9a). Accordingly, the courts below applied the balancing test of *Pike* v. *Bruce Church Inc.* to determine the constitutionality of the Michigan Solid Waste Management Act, instead of subjecting such Act to the strict scrutiny test, as would have been required under *Maine* v. *Taylor*, *Hughes* v. *Oklahoma* and, now, *Wyoming* v. *Oklahoma*, if the courts had determined that the Waste Importation Restrictions discriminated against interstate transactions. Therefore, the courts below did not address the issue of whether the State had sustained, or could ever sustain, the burden of demonstrating that its purported purpose in enacting the Waste Importation Restrictions was legitimate

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ment plan so as to permit the importation of solid waste, but only with the approval of two-thirds of the municipalities within the County and the State Department of Natural Resources. However, the fact that Petitioner could seek to persuade the county, municipal and state authorities to adopt and approve an amendment to the existing solid waste management plan, which, if so adopted and approved, would permit the importation of out-of-state solid waste, is no more relevant in the instant case than was the fact that the City of Philadelphia or Polar Ice Cream and Creamery Co. could have sought to persuade the New Jersey or Florida regulators to amend the exclusionary state regulations which were promulgated under the statutes found to be unconstitutional in *City of Philadelphia* v. *New Jersey* and in *Polar Ice Cream and Creamy Co.* v. *Andrews*.

and that such purpose "could not be served as well by available nondiscriminatory means." 477 U.S. at 138.

By so determining that the Michigan Solid Waste Management Act does not discriminate against interstate commerce because it also discriminates against some in-state commerce, the decisions below directly conflict with this Court's decision in *Dean Milk Co.* v. *Madison*, 340 U.S. 349 (1951), and other decisions of this Court which stand for the principle that "it is immaterial," for purposes of determining whether legislation discriminates against interstate commerce, "that [other in-state commerce] is subjected to the same proscription as that moving in interstate commerce." *Dean Milk*, 340 U.S. at 354 n.4.

In *Dean Milk*, this Court invalidated a Madison, Wisconsin ordinance which prohibited the sale of pasteurized milk within the City of Madison unless such milk had been processed and bottled at an approved pasteurization plant within a radius of five miles from the central square of Madison. Similar to the Michigan Solid Waste Management Act, the Madison ordinance subjected most Wisconsin milk to the same proscription as out-of-state milk. Nonetheless, the Court held that the ordinance "plainly discriminate[d] against interstate commerce," 340 U.S. at 354, noting that "it [was] immaterial that Wisconsin milk from outside the Madison area [was] subject to the same proscription as that moving in interstate commerce. *Cf. Brimmer* v. *Rebman*, 138 U.S. 78, 82-83 (1891)." 340 U.S. at 354 n.4. The Court held that the Madison ordinance violated the Commerce Clause because reasonable non-discriminatory alternatives, adequate to serve legitimate local interests, were available. 340 U.S. at 354-55.

In *Brimmer* v. *Rebman*, cited in the above-quoted footnote to *Dean Milk*, the Court held that a Virginia

statute which in effect prohibited the sale within Virginia of meat from animals which had been slaughtered 100 miles or more from the place of sale impermissibly discriminated against interstate commerce, even though it applied equally to sales of meat from animals which had been slaughtered in Virginia and thereafter transported 100 or more miles within Virginia and to sales of meat from animals which had been slaughtered in another state and transported 100 or more miles into Virginia. *See* 138 U.S. at 81-83. In so holding, the Court stated that " 'a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute.' " 138 U.S. at 83 (citing *Minnesota* v. *Barber*, 136 U.S. 313, 326 (1890)). Similarly, in *Polar Ice Cream and Creamery Co.* v. *Andrews*, 375 U.S. 361 (1964), this Court held that a Florida statute and regulations thereunder which required a local milk processor and distributor to purchase to the extent possible all of its Class I milk requirements at a fixed price from producers located within a four-county marketing area imposed an impermissible burden on interstate commerce, notwithstanding the fact that the same statute applied so as to limit the right of the distributor to buy milk which was produced in Florida, but outside the four-county marketing area.

The principle enunciated in *Dean Milk Co.* v. *Madison*, *Brimmer* v. *Rebman* and *Polar Ice Cream and Creamery Co.* v. *Andrews*—that a state may not impose a discriminatory embargo upon the importation of out-of-state articles of commerce into a subdivision thereof even though articles of commerce from elsewhere in the state are subject to such embargo—is a fundamental corollary to the basic constitutional principle that a state cannot impose an embargo upon articles of commerce from a

sister state, except in the case of necessary quarantines. If this Court were to adopt a new principle, espoused by the courts below,[15] that state legislation which excludes interstate commerce from local areas will not be deemed to discriminate against interstate commerce so long as other non-local, in-state commerce is subject to the same prohibitions, then it would necessarily follow that, notwithstanding the prior decisions of this Court (which have heretofore constrained both state and local discrimination against out-of-state commerce), a state would hereafter be permitted to enact legislation which authorized, and/or required compliance with, legislation or regulations of existing local governmental entities or newly-established regional districts within the state that prohibited the importation of, or imposed discriminatory tariffs upon, numerous articles of commerce which were produced outside the boundaries of such entities or districts, unless those who were adversely affected by such burdens

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[15] The same principle appears to have been applied by the Ninth Circuit in *Evergreen Waste Systems, Inc.* v. *Metropolitan Service District*, 820 F.2d 1482 (9th Cir. 1987), and by the Eleventh Circuit in *Diamond Waste, Inc.* v. *Monroe County*, 939 F.2d 941 (11th Cir. 1991). However, the *Diamond Waste* court also determined that a county's absolute ban on waste generated out of county imposed a burden on interstate commerce which was clearly excessive in relationship to the putative local benefits sought to be achieved by the ban. Accordingly, the Court of Appeals held that the county ban on out-of-state waste violated the Commerce Clause under the *Pike* test. 939 F.2d at 944-46. It should also be noted that it has been properly suggested that *Evergreen* might have been decided under the market participant exception to the Commerce Clause; however, the opinion of the court in *Evergreen* makes no reference to the market participant exception. *See BFI Medical Waste Systems, Inc.* v. *Whatcom County*, 756 F. Supp. 480, 485 (W.D. Wash. 1991). It is noteworthy that none of *Dean Milk*, *Brimmer* v. *Rebman* and *Polar Ice Cream Creamery Co.* was discussed or even cited in either the opinion below or the opinion of the Ninth Circuit in *Evergreen*.

could show that the burdens imposed on such commerce were "clearly excessive in relation to the putative local benefits" sought to be achieved by such legislation. *See Pike* v. *Bruce Church, Inc.*, 397 U.S. at 142. For example, if it were true, as the courts below have held, that it is permissible under the Commerce Clause for a state or its subdivisions to favor in-county generated articles of commerce over out-of-county and out-of-state generated articles of commerce, as long as the *Pike* test can be satisfied, then, notwithstanding this Court's decision in *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), the State of Hawaii could authorize the City of Honolulu to impose a sales tax on all liquor which was distilled outside the city limits provided that it could be shown that the exemption for liquor distilled inside the city served the local purpose of fostering local distilleries of Okolehao and would only have trivial effects on interstate commerce, thereby satisfying the *Pike* test.[16] As a consequence, it is inevitable that the pernicious principle applied by the courts below, if adopted by this Court, will, as Justice Clark warned in *Dean Milk*, "invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause," 340 U.S. at 356, and will effectively subvert the "ultimate" constitutional principle which was reiterated in *Dean Milk* that " 'one state in its dealings with another may not place itself in a position of economic isolation.' *Baldwin* v. *G.A.F. Seelig, Inc.*, [294 U.S. 511] at 527." *Id.* at 356.

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[16] By contrast this Court has heretofore held that where a state has erected discriminatory state-wide barriers to interstate commerce, it is irrelevant, for purposes of determining whether such barriers violate the Commerce Clause under the strict scrutiny test, that the effect of such barriers on interstate commerce is insubstantial. *See New Energy Co. of Indiana* v. *Limbach*, 486 U.S. 269, 275 (1988); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 269 (1984).

In *United Building & Construction Trades Council of Camden County and Vicinity* v. *Mayor of Camden*, 465 U.S. 208 (1984), this Court held that a Camden, New Jersey, ordinance requiring the hiring of city residents to work on city construction projects was not immune from constitutional review under the Privileges and Immunities Clause, U.S. Const. Art. IV, § 2, at the behest of out-of-state residents merely because some in-state residents were similarly disadvantaged. While the Court's holding is not directly relevant to the instant case, since the holding was based upon the Privileges and Immunities Clause, the Court's reasoning is directly applicable to Respondents' contention that the strict scrutiny test (not to mention the virtual per se rule) should not be applied to local prohibitions which affect both interstate commerce and some non-local intrastate commerce: [17]

> [A] blanket exemption for all classifications that are less than statewide would provide States with a simple means for evading the strictures of the Privileges and Immunities Clause. Suppose, for example, that California wanted to guarantee that all employees of contractors and subcontractors working on construction projects funded in whole or in part by state funds are state residents. Under the dissent's analysis, the California legislature need merely divide the State in half, providing one

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[17] Although Justice Blackmun dissented from the Court's decision in *United Building & Construction Trades Council* v. *Mayor of Camden*, 465 U.S. 208 (1984), he noted in his dissent that his objections to the Court's reasoning would not be applicable in a Commerce Clause case: "The Commerce Clause entails a substantive policy of unimpeded interstate commerce that is impermissibly undermined by local protectionism even when intrastate commerce is penalized as well." 465 U.S. at 235 (Blackmun, J., dissenting) (citing *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 354, and n.4 (1951)).

> resident-hiring preference for northern Californians on all such projects taking place in northern California, and one for southern Californians on all projects taking place in southern California. State residents generally would benefit from the law at the expense of out-of-state residents; yet the law would be immune from scrutiny under the Clause simply because it was not phrased in terms of *state* citizenship or residency. Such a formalistic construction would effectively write the Clause out of the Constitution.

465 U.S. at 217-218 n.9.[18]

Aside from the fact that it would have pernicious effects upon the application of the Commerce Clause to future state protectionist legislation, the principle that localized discrimination against commerce originating in another state is permissible cannot stand since it "tends to beget retaliating regulations, not less expensive and vexatious in themselves than they are destructive of the general harmony," *Observations by J.M., Vices of the Political System of the U. States, April, 1787*, printed in II The Writings of James Madison, 1783-1787 361, 363

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[18] Exactly such a formalistic division of a state for the purpose of attempting to evade the strictures of the Commerce Clause was recently proposed to the Pennsylvania legislature by the Governor of Pennsylvania. Under proposed amendments to the Pennsylvania Municipal Waste Planning, Recycling and Waste Reduction Act, the State of Pennsylvania would be divided into four "wastesheds," and the transportation of municipal waste into or out of a "wasteshed" would, with certain limited exceptions, be prohibited. Under such amendments, no municipal waste from out of Pennsylvania could be imported into Pennsylvania for disposal in any of the wastesheds. Penn. H.R. No. 2313, Gen. Assemb. 1992 Sess. (1992). In light of the foregoing, it appears that the multiplication of preferential trade areas which Justice Clark foresaw in *Dean Milk* may be about to occur in Pennsylvania.

(Hunt, Gaillard ed. 1901), and is completely inconsistent with the theory of our Constitution that "the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin* v. *G.A.F. Seelig*, 294 U.S. at 523.

In light of the foregoing, it is clear that by allowing only locally-generated waste to be disposed of in private landfills in St. Clair County, the Waste Importation Restrictions "discriminate against interstate commerce" within the meaning of this Court's decisions in *Wyoming* v. *Oklahoma*, 60 U.S.L.W. at 4124; *Maine* v. *Taylor*, 477 U.S. at 138; and *City of Philadelphia* v. *New Jersey*, 437 U.S. at 624, with the result that the courts below should at least have required the State to sustain the burden of demonstrating that the Waste Importation Restrictions serve a legitimate local purpose which could not be served as well by available nondiscriminatory means.[19]

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[19] As is apparent from the text, it is Petitioner's position that the Waste Importation Restrictions violate the dormant Commerce Clause because, both directly and by incorporating the St. Clair County solid waste management plan, they impose a discriminatory embargo upon the importation of out-of-county waste into St. Clair County. Thus Petitioner's case does not depend upon a finding that the Waste Importation Restrictions, both directly and through the incorporation of the solid waste management plans of other counties in Michigan, impose an embargo upon the importation of out-of-state waste into such other counties. On the other hand, the Court should not be misled into believing that, as Respondent St. Clair County has stated, "Michigan is one marketplace and remains available as a depository of solid waste to interstate commerce." County Brief in Opposition at 9. On the contrary, a review of the various county plans (which, although not a part of the record in this case, constitute an official part of the State Solid Waste Management Plan and are matters of public record) reveals that out of the eighty-three counties in Michigan, seventy-five do not explicitly authorize the importation of out-of-state waste for disposal in landfills located within the county, and thus, under the Michigan

[Footnote continued on following page]

II.

THE WASTE IMPORTATION RESTRICTIONS ARE SUBJECT TO THE STRICT SCRUTINY TEST.

In their briefs in opposition to Petitioner's Petition for a Writ of *Certiorari*, Respondents appear to suggest that the strict scrutiny test (not to mention the virtual per se rule) should not apply to the Waste Importation Restrictions even if this Court concludes that the Waste Importation Restrictions discriminate against interstate commerce. Specifically, Respondents suggest that the Waste Importation Restrictions are not governed by decisions of this Court striking down discriminatory embargoes or tariffs since the Waste Importation Restrictions were not motivated by economic protectionism, but rather by public health concerns. In addition, Respondents suggest that the Waste Importation Restrictions should be governed by what they assert is a special rule for natural resources. Both of these contentions are unfounded, as would have been the contention, which Respondents have not yet

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Solid Waste Management Act, the importation of out-of-state solid waste into such counties is prohibited; one county permits 600 tons per week to be imported into such county from Indiana; one county allows one Wisconsin company to dispose of its waste at such company's own landfill within the county; one county allows waste to be imported from the State of Wisconsin; and each of five other counties permits the importation of waste from specified counties in adjoining states—*i.e.*, Wisconsin, Indiana and Ohio—for disposal at landfills located within the county. No county within the entire State of Michigan explicitly permits the importation of waste from any state not adjoining Michigan for disposal at landfills located therein, and thus, under the Michigan Solid Waste Management Act the importation of solid waste from such other states is prohibited, as is the importation of solid waste from counties in Ohio and Indiana which are not specifically named in any of the county plans. A county by county summary of such county plans is set forth in the Appendix hereto.

made, that the Waste Importation Restrictions are subject to a special rule for quarantines.

A. The Waste Importation Restrictions Are Subject To The Strict Scrutiny Test Notwithstanding Their Purported Legislative Purpose.

Respondents seek to distinguish *Dean Milk* v. *Madison*, *Brimmer* v. *Rebman* and *Polar Ice Cream and Creamery Co.* v. *Andrews* (and presumably, all of the other cases which have struck down discriminatory embargoes upon the importation of articles of commerce from sister states) on the alleged ground that in each case "the laws at issue were specifically designed and expressly found by the Court to be protectionist measures favoring local economic interests." State Brief in Opposition at 36-37. By contrast, the Waste Importation Restrictions, which are part of the Michigan Solid Waste Management Act, are said to be distinguishable because the Michigan Solid Waste Management Act is said to be "firmly rooted in protecting the health, safety and welfare of its citizens." County Brief in Opposition at 13.[20]

Respondents' attempts to distinguish the long line of cases in which this Court has struck down discriminatory embargoes are unavailing. As this Court recently

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[20] Respondents do not suggest that the Michigan Solid Waste Management Act does not have any economic consequences upon interstate commerce; such consequences, however, are said to be merely "incidental." While such economic consequences may seem inconsequential to the State, they certainly are not "incidental" to Petitioner, which is absolutely barred from accepting out-of-state waste at its landfill, or to Petitioner's potential out-of-state customers, which are absolutely barred from delivering their solid waste to Petitioner or to any other landfill in St. Clair County. Moreover, it is quite likely that the economic benefits which the citizens of St. Clair County will realize at the expense of foreigners by preserving local landfills for their present and future exclusive use will not be deemed by them to be "incidental."

noted in *Wyoming* v. *Oklahoma*, "[w]e have often examined a 'presumably legitimate goal,' only to find that the State attempted to achieve it by the 'illegitimate means of isolating the State from the national economy.'" 60 U.S.L.W. at 4125 (citing *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 627 (1978)). Moreover, as this Court stated in *City of Philadelphia* v. *New Jersey*:

> Contrary to the evident assumption of the state court and the parties, the evil of protectionism can reside in legislative means as well as legislative ends. Thus, it does not matter whether the ultimate aim of ch. 363 is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. . . . But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. Both on its face and in its plain effect, ch. 363 violates this principle of nondiscrimination.

437 U.S. at 626-27.

The Court's conclusion in *City of Philadelphia* v. *New Jersey* that a state cannot use the illegitimate means of discriminating against out-of-state commerce to achieve admittedly legitimate public health goals is consistent with this Court's decisions in the nine cases since 1873 in which this Court has determined the validity of a state-imposed discriminatory embargo upon the importation of articles of commerce from a sister state, not involving a quarantine. In each such case, the state attempted to justify the embargo by claiming that it served the legiti-

mate end of protecting the health, safety or welfare of its citizens, and in each such case the Court struck down the embargo. *See Wyoming* v. *Oklahoma*, 60 U.S.L.W. 4119 (1992) (in which the state claimed that sustaining the Oklahoma coal-mining industry lessened the state's reliance on a single source of coal delivered over a single rail line); *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978) (in which the state claimed that the embargo was necessary (i) to preserve the health of New Jersey citizens by limiting their exposure to solid waste and to solid waste disposal areas and (ii) to preserve its landfill capacity); *Great Atlantic & Pacific Tea Co., Inc.* v. *Cottrell*, 424 U.S. 366 (1976) (in which the state claimed that the reciprocity requirement, with a resulting embargo, was necessary to assure the distribution of healthful milk products to state residents); *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361 (1964) (in which the state apparently contended that the exclusion of foreign milk from the district was necessary both as an economic matter to protect the welfare of Florida dairy farmers and as a health measure to insure the existence of a wholesome supply of milk); *Dean Milk* v. *Madison*, 340 U.S. 349 (1951) (in which the state claimed that the embargo was necessary to safeguard public health by making adequate sanitation inspections possible); *Edwards* v. *California*, 314 U.S. 160 (1941) (in which the state claimed that the embargo was necessary to stop a huge influx of migrants into the state which would create health, moral and financial problems); *Brimmer* v. *Rebman*, 138 U.S. 78 (1891) (in which the state claimed the embargo was necessary to prevent unwholesome meats from being sold in Virginia); *Minnesota* v. *Barber*, 136 U.S. 313 (1890) (in which the state claimed that local pre-slaughtering inspection was necessary to protect the health of its citizens); and *Hannibal and St. Joseph R.R. Co.* v. *Husen*,

95 U.S. 465 (1877) (in which the state claimed that a sweeping embargo was necessary to prevent the spread of disease from the importation of diseased cattle).

Respondents have not disputed the fact that in the instant case the means which were chosen to achieve the legislative goal resulted in the imposition of an embargo upon the importation of waste from out of state into St. Clair County. However, the State defends the embargo on the ground that "the control of importation by a county is essential" to planning for its landfill requirements. State Brief in Opposition at 13. In like manner, the County defends the embargo on the ground that the State and its counties "must also be allowed to plan for the disposal of all waste which will be disposed of in-state, including that entering its borders from without." County Brief in Opposition at 18-19. Such defenses are ill-conceived: if, as is clear from the relevant case law, the State's ultimate goal of preserving or enhancing landfill capacity for the benefit of its citizens cannot be achieved through the use of the illegitimate means of imposing an embargo upon interstate commerce, then it necessarily follows that the intermediate goal of planning for the purpose of so preserving or enhancing landfill capacity for the benefit of its citizens cannot be achieved through the use of such illegitimate means.

B. No Special Rule For Natural Resources Exists.

In its brief in opposition to the Petition for a Writ of *Certiorari*, the State asserted that this case should not be governed by *City of Philadelphia* v. *New Jersey* but should instead be governed by what the State contends is the different standard of *Sporhase* v. *Nebraska*, 458 U.S. 941 (1982), under which, in the view of the State, Michigan landfills, like Nebraska ground water, have the " 'indicia of a good publicly produced and owned in which a State

may favor its own citizens. . . .'" State Brief in Opposition at 32 (*quoting Sporhase* v. *Nebraska*, 458 U.S. at 957).

On its face, the State's argument is ill-conceived since Petitioner's privately-owned and developed landfill has none of the "indicia of a good publicly produced and owned in which a State may favor its own citizens . . .." From the citations in *Sporhase* which follow the extract which the State has quoted (*i.e.*, "See *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980), cf. *City of Philadelphia* v. *New Jersey*, 437 U.S. at 627-628, and n.6.; *Baldwin* v. *Montana Fish and Game Comm'n*, 436 U.S. 371 (1978)," 458 U.S. at 957), it is clear that the "indicia" to which the Court referred in the quotation were those which have been recognized as entitling the State to the benefits of the market participant exception to the strict scrutiny rule —*i.e.*, ownership of a cement factory, state-subsidized enterprises or state proprietary actions—or which entitled the State to impose a discriminatory license fee upon non-residents under the Privileges and Immunities Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution—*i.e.*, where the State had incurred substantial costs to conserve its elk population. By contrast, the State has no comparable interest in Petitioner's landfill. That landfill was purchased and developed solely with private money, it operates without any state subsidy, and it, like other privately-owned real property, is subject to taxation. These hardly seem to be the indicia of a "good publicly produced and owned." 458 U.S. at 957.

Moreover, a review of all of the cases in which this Court has determined whether a state may impose a discriminatory embargo upon the exportation of articles of commerce from the state, other than in the case of a

quarantine, or may discriminatorily restrict the use of a privately-owned resource, demonstrates that the State's reliance upon *Sporhase*, or any other natural resource case decided by this Court, is unfounded.

In *Geer* v. *Connecticut*, 161 U.S. 519 (1896), *overruled in Hughes* v. *Oklahoma*, 441 U.S. 322 (1979), this Court upheld as not violative of the Commerce Clause a Connecticut statute which prohibited the exportation of game birds killed within the state, even though the use and sale of such game birds within the state was not prohibited. In reaching this conclusion, the Court apparently assumed that a state could not impose a like constraint upon the exportation of private articles of commerce, but it held that Connecticut, as the representative for its citizens, who "owned" in common all wild animals within the state, had the power to control who could own the game birds and, by exercise of such power, could bar the game birds from ever entering the stream of interstate commerce "since the restriction that it should not become the subject of external commerce went along with the grant and was a part of it." 161 U.S. at 530-532. Thus, the Court held that the statute removed any transactions involving wild animals killed in Connecticut from interstate commerce.

Geer v. *Connecticut* was followed in *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349 (1908), wherein the Court, in three sentences, dismissed a Commerce Clause challenge to a New Jersey statute which prohibited the exportation of ground water to another state, apparently on the ground that the possessor of ground water has a "limited and qualified" property right therein which cannot be enlarged by "his desire to use it in commerce among the States." 209 U.S. at 357.

Since 1908, however, this Court has never again upheld, upon a challenge under the Commerce Clause, any state statute which imposed a discriminatory embargo upon the exportation of any articles of commerce derived from the natural resources of the state. Thus, just three years after its decision in *Hudson County Water Co.* v. *McCarter*, the Court struck down, as violative of the Commerce Clause, an Oklahoma statute which prohibited the transportation of natural gas into other states while still permitting the transportation of natural gas for commercial purposes within the State. *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911). The Court distinguished *Geer* v. *Connecticut* and *Hudson County Water Co.* v. *McCarter*, apparently on the ground that the possessor of wild life and water had a limited and qualified property interest therein, whereas the "surface proprietors within the gas field all have the right of reducing to possession the gas and oil beneath," 221 U.S. at 253, and it rejected Oklahoma's argument that it had a right to conserve the gas for the use of its citizens:

> The statute of Oklahoma recognizes [gas] to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial—the business welfare of the State, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of the State would confine them to the inhabitants of the State. If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the

> products of the field be brought within the principle?

221 U.S. at 255.[21]

In subsequent decisions the Court struck down, as violative of the Commerce Clause, a West Virginia statute which required existing public service pipeline companies to give a preference to local consumers over established consumers in Ohio and Pennsylvania, *Pennsylvania* v. *West Virginia,* 262 U.S. 553 (1923), and a Louisiana statute which prohibited the exportation of shrimp taken from Louisiana waters unless the heads and hulls thereof had been removed. *Foster-Fountain Packing Co.* v. *Haydel,* 278 U.S. 1 (1928). In *Foster-Fountain Packing Co.*, the Court distinguished *Geer* v. *Connecticut* on the ground that, by permitting its shrimp to be shipped and sold outside the state, albeit after processing within the state, the state had released its "hold" and terminated its "control," with the result that the statute at issue violated the basic principle stated therein that:

> A State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the state.

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[21] In this connection, it is noteworthy that Michigan, as did Oklahoma with respect to natural gas, recognized in the Michigan Solid Waste Management Act that solid waste is a subject of commerce:

> This act is not intended to prohibit the continuation of the private sector from doing business in solid waste disposal and transportation. This act is intended to encourage the continuation of the private sector in the solid waste disposal and transportation business when in compliance with the minimum requirements of this act.

MSWMA § 35(1), Mich. Comp. Laws Ann. § 299.435(1) (1991 Supp.).

> *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 596 . . . *West* v. *Kansas Natural Gas Co.* 221 U.S. 229, 255.

278 U.S. at 10-11.

Subsequently, the Court, without mentioning *Geer* v. *Connecticut*, rejected New Jersey's contention that its prohibition upon the importation of out-of-state waste into New Jersey for disposal in New Jersey landfills was permissible under the Commerce Clause because it was necessary to conserve the natural resource of landfill areas within the state for the disposal of waste generated within the state. *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978). In so holding, the Court said:

> The New Jersey law at issue in this case falls squarely within the area that the Commerce Clause puts off limits to state regulation. On its face, it imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space. It is true that in our previous cases the scarce natural resource was itself the article of commerce, whereas here the scarce resource and the article of commerce are distinct. But that difference is without consequence. In both instances, the State has overtly moved to slow or freeze the flow of commerce for protectionist reasons. It does not matter that the State has shut the article of commerce inside the State in one case and outside the State in the other. What is crucial is the attempt by the State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade.

437 U.S. at 628.[22]

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[22] In *Baldwin* v. *Montana Fish and Game Comm'n*, 436 U.S.

[Footnote continued on following page]

Eventually, in *Hughes* v. *Oklahoma*, 441 U.S. 322 (1979), the Court overruled *Geer* v. *Connecticut* on the ground that the limited property ownership principle relied upon therein was outmoded, and it held that "challenges under the Commerce Clause to state regulation of wild animals should be considered according to the same general rule applied to state regulations of other natural resources . . . ." 441 U.S. at 335. The Court then struck down an Oklahoma statute which prohibited the exportation to other states of natural minnows seined from local waters, even though the sale or use of such natural minnows in-state was unrestricted, on the ground that " 'Oklahoma ha[d] chosen to 'conserve' its minnows in a way that most overtly discriminate[d] against interstate commerce." 441 U.S. at 338.

In recent years, the Court has struck down, as violative of the Commerce Clause, state statutes seeking to impose a discriminatory embargo upon (i) the exportation of privately-owned and produced electricity to out-of-state customers, *see New England Power Co.* v. *New Hampshire*, 455 U.S. 331 (1982), and, as more fully discussed below, (ii) the exportation of water out of state.

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371 (1978), a case arising under the Privileges and Immunities Clause, Art. IV, § 2, U.S. Constitution, which was decided one month prior to *City of Philadelphia* v. *New Jersey*, the Court noted that:

> In more recent years, however, the Court has recognized that the States' interest in regulating and controlling those things they claim to "own," including wildlife, is by no means absolute. States may not compel the confinement of the benefits of their resources, even their wildlife, to their own people whenever such hoarding and confinement impedes interstate commerce.

436 U.S. at 385-386.

Sporhase v. *Nebraska*, 458 U.S. 941 (1982).[23] The opinion in *New England Power Co.* is particularly instructive for present purposes, since the then Chief Justice, writing for a unanimous Court, stated therein:

> Our cases consistently have held that the Commerce Clause of the Constitution, Art I, § 8, cl. 3, precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom. *E.g.*, *Hughes* v. *Oklahoma*, 441 U.S. 322 (1979), *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923); *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911). Only recently, in *Philadelphia* v. *New Jersey*, 437 U.S. 617, 627 (1978), we reiterated that "[t]hese cases stand for the basic principle that a 'State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State.'" (quoting *Foster-Fountain Packing Co.* v. *Haydel*, 278 U.S. 1, 10 (1928)).

445 U.S. at 338 (footnote omitted).

In light of the foregoing, a corollary to the rule which generally applies to state discriminatory prohibitions against articles of interstate commerce also applies to articles of commerce comprised of or derived from natural resources—*i.e.*, that a state may not either impose dis-

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[23] In 1966, the Court had summarily affirmed *City of Altus* v. *Carr*, 255 F. Supp. 828 (W.D. Tex 1966), *aff'd per curiam*, *Carr* v. *Altus*, 385 U.S. 35 (1966), wherein the District Court had held unconstitutional a Texas statute which prohibited the exportation of water to another state.

criminatory prohibitions upon the exportation of articles of commerce derived from local natural resources, or reserve such natural resources for local commercial use only.[24]

Sporhase v. *Nebraska*, 458 U.S. 941 (1982), upon which Respondents have heavily relied, lends no support whatsoever to their contention that the Commerce Clause authorizes the discriminatory prohibitions which are imposed by the Waste Importation Restrictions upon the disposal of foreign solid waste at private Michigan landfills. Indeed, as noted above, the holding of the case is that the statute at issue violated the Commerce Clause because, through its reciprocity requirement, it imposed a discriminatory embargo upon the exportation of water. The Court did uphold the remainder of the state statute which required a permit subjecting the exportation of water out of state to certain conditions (which Appellants did not challenge as unreasonable in their briefs, *see* 458 U.S. at 957), even though the same permit was not required for intrastate shipments of water. However, the portion of the state statute which was upheld did not impose an outright embargo upon the exportation of water, and intrastate shipments of water were subject to "severe withdrawal and use restrictions." 458 U.S. at 955-956. Indeed, the Court stated that those portions of the statute which were upheld "may well be no more strict in application than the limitations upon intrastate transfers imposed" by Nebraska. 458 U.S. at 956. By contrast, in the instant case, no such restrictions are imposed upon the

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[24] The rule also applies to locally owned and regulated commercial resources. *See Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980) (holding unconstitutional, under the Commerce Clause, a Florida statute prohibiting out-of-state bank holding companies from owning or controlling Florida companies providing investment advisory or trust services).

citizens of St. Clair County who wish to deposit waste in local landfills, whereas foreigners are absolutely barred from depositing their waste in St. Clair County.

In light of the foregoing, it is indisputable that the Waste Importation Restrictions are not subject to any special exception to the strict scrutiny test, even if one makes the unwarranted assumption that privately owned, developed and operated landfills are analogous to natural resources.

C. The Waste Importation Restrictions Cannot Be Upheld Under The Quarantine Cases.

Respondents have not heretofore argued that the Waste Importation Restrictions can be sustained under a quarantine exception. Nonetheless, because the strict scrutiny test and the virtual per se rule subsumed therein are subject to an exception in the case of quarantines, and because the dissenters in *City of Philadelphia* v. *New Jersey* did suggest that the New Jersey statute should be upheld on the basis of that exception, it is appropriate to consider herein the scope of the exception and the factual circumstances which demonstrate that the Waste Importation Restrictions cannot be sustained on the basis of such exception.

The first case after 1873 in which the Court upheld a quarantine law was *Morgan's Steamship Co.* v. *Louisiana Board of Health*, 118 U.S. 455 (1886), wherein the Court upheld, as not violative of the Commerce Clause, a Louisiana law which imposed fees upon vessels arriving at the port of New Orleans as part of a "system of quarantine provided by the laws of Louisiana, for the protection of the State, and especially of New Orleans, an important commercial city, from infectious and contagious diseases which might be brought there by vessels coming

through the Gulf of Mexico from all parts of the world. . . ." 118 U.S. at 458.

Since deciding *Morgan's Steamship* in 1886, the Court has upheld several state quarantine statutes or regulations without expressly finding that a similar constraint was imposed by the state upon the in-state movement of like articles of commerce, but all of such statutes and regulations prohibited the importation of diseased or potentially diseased animals or live baitfish infested or potentially infested by parasites. *See Maine* v. *Taylor*, 477 U.S. 131 (1986); *Mintz* v. *Baldwin, Commissioner of Agriculture and Markets of New York*, 289 U.S. 346 (1933); *Asbell* v. *Kansas*, 209 U.S. 251 (1908); *Reid* v. *Colorado*, 187 U.S. 137 (1902); *Smith* v. *St. Louis and Southwestern Railway Co.*, 181 U.S. 248 (1901); *Rasmussen* v. *Idaho*, 181 U.S. 198 (1901).[25] Moreover, in each of these cases, the Court particularly emphasized the necessity of the restraint. *See, e.g., Rasmussen* v. *Idaho*, 181 U.S. at 202 (the Idaho legislation, as implemented by the governor's proclamation, provided "only such restraints upon the introduction of sheep from other States as in the judgment of the State [was] absolutely necessary to prevent the spread of disease"). *Accord, Hannibal and St. Joseph Railroad Co.* v. *Husen*, 95 U.S. 465 (1877) (in establishing a quarantine, the state "may not interfere with transportation into or through the state, beyond what is absolutely necessary for its self-protection." 95 U.S. at 472).

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[25] In *Oregon-Washington R. & Navigation Co.* v. *Washington*, 270 U.S. 87 (1926), the Court stated that the State of Washington could, under the Commerce Clause, issue a quarantine order which prohibited the importation of alfalfa hay or meal infested or potentially infested by the alfalfa weevil, *see* 270 U.S. at 93-96, but the Court held that the order was preempted by Federal legislation.

The principle established by the foregoing quarantine cases—that a state may impose limited restraints [26] on the importation of articles of commerce from out of state when essential to prevent the introduction or spread of disease or a similar pestilence—does not afford any basis for upholding the prohibition which the Waste Importation Restrictions impose upon the importation of solid waste from out of state. In the first place, there is nothing in the record which demonstrates that the imposition of an embargo on out-of-state waste is essential to prevent the introduction or spread of disease [27] or even

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[26] It is by no means clear that the quarantine cases which support such principle involved *discriminatory* restraints—i.e., restraints upon the importation of diseased or infested articles of commerce while no such restraint was imposed upon the in-state movement of like articles of commerce—and the imposition of a discriminatory restraint, even upon such articles of commerce, may not be permissible. *See City of Philadelphia* v. *New Jersey*, 437 U.S. at 629:

> The harms caused by waste are said to arise after its disposal in landfill sites, and at that point, as New Jersey concedes, there is no basis to distinguish out-of-state waste from domestic waste. If one is inherently harmful, so is the other. Yet New Jersey has banned the former while leaving its landfill sites open to the latter. The New Jersey law blocks the importation of waste in an obvious effort to saddle those outside the State with the entire burden of slowing the flow of refuse into New Jersey's remaining landfill sites. That legislative effort is clearly impermissible under the Commerce Clause of the Constitution.

[27] It should be noted that the Michigan solid waste embargo covers far more than garbage. It also applies to "rubbish", which term is defined as "nonputrescible solid waste, excluding ashes, consisting of both combustible and noncombustible waste, including paper, cardboard, metal containers, yard clippings, wood, glass, bedding, crockery, demolished building materials," as well as "litter of any kind that may be a detriment to the public health and safety." See Michigan Solid Waste Management Act, Mich. Comp. Laws Ann. §§ 299.406(5), 299.407(1) (1991 Supp.).

that solid waste, if transported and disposed of as required by the Michigan Solid Waste Management Act, poses any health or safety dangers to the citizens of Michigan. Moreover, as Respondents acknowledge, the Michigan Solid Waste Management Act sets forth a comprehensive plan for ensuring that the transportation and disposal of solid waste will be undertaken in an environmentally sound manner. For example, Section 14 of the Michigan Solid Waste Management Act requires the Department of Natural Resources, in connection with issuing a license to a landfill facility, to determine a course of action "consistent with section 4005 of title 2 of the solid waste disposal act, 42 U.S.C. 6945, and with this act and the rules promulgated pursuant to this act." Mich. Comp. Laws Ann. § 299.414 (1991 Supp.). The Federal law which is thus incorporated in the Michigan Solid Waste Management Act generally prohibits the "open dumping" of solid waste, see Solid Waste Disposal Act (otherwise known as the Resource Conservation and Recovery Act of 1976), as amended, § 4005, 42 U.S.C. § 6945—*i.e.*, the disposal of solid waste at other than a sanitary landfill, *see* 42 U.S.C. § 6903(14), 6903(26), 6907(a)(3), 6944—and a landfill can be classified as a sanitary landfill "only if there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility." 42 U.S.C. § 6944(a). Similarly, Section 22(1) of the Michigan Solid Waste Management Act requires that all vehicles used to transport garbage, sludge or other moisture-laden materials "shall be watertight and constructed, maintained, and operated to prevent littering." Solid waste transporting units used for hauling other solid waste are required to be "designed and operated to prevent littering or any other nuisance." Mich. Comp. Laws Ann. § 299.422(1) (1991 Supp.).

In addition, Michigan has promulgated regulations under the Michigan Solid Waste Management Act, Mich. Admin. Code rr. 299.4101 *et seq.* (1982), which set forth detailed requirements for the location, design, operation and closure of solid waste landfills, including regulations which impose restrictions on public access to solid waste landfills, Mich. Admin. Code r. 299.4315(3), require application of six inches of daily cover to all solid waste landfills, Mich. Admin. Code r. 299.4316(1), impose controls on run-on to, and run-off from, solid waste landfills, Mich. Admin. Code rr. 299.4305(7)(9) and 299.4315(13), and prohibit the disposal of hazardous waste, liquids and sewage at solid waste landfills, Mich. Admin. Code r. 299.4315(8).

Moreover, the Federal Environmental Protection Agency has recently adopted a new rule, Criteria for Municipal Solid Waste Landfills, 56 Fed. Reg. 50978 (October 9, 1991) (to be codified at 40 C.F.R. Part 258) (the "New Regulations"), which sets forth detailed requirements for the siting, design, operation and closure of landfills, and for ground water monitoring and corrective action, most of which requirements will become effective in 1993. 56 Fed. Reg. 50978, 51017 (to be codified at 40 C.F.R. § 258.1(e)). Such New Regulations specifically state that the "minimum national criteria" prescribed thereby "ensure the protection of human health and the environment." *Id.* at 51017 (to be codified as 40 C.F.R. § 258.1(a)). Similarly, the release promulgating the New Regulations stated that the operating criteria set forth therein contained a "variety of landfill management requirements that are aimed at preventing potential environmental or public health problems," *id.* at 50988, and further indicated:

> These provisions include restrictions on public access to the landfill, daily cover requirements to

> minimize disease vector and other problems, methane gas controls to prevent gas explosions, controls on runoff from the facility to prevent releases to surface and ground water resources, and restrictions on the landfilling of certain wastes, including hazardous waste and liquid wastes, to minimize the toxicity and quantity of leachate that may threaten ground water.

Id. at 50988 (October 9, 1991).

In light of the belief of the Federal Environmental Protection Agency that its new minimum national criteria will prevent potential environmental or public health problems, there does not appear to be any basis upon which the State of Michigan could contend that its draconian method of imposing an embargo on out-of-state waste [28] is essential to prevent the introduction or spread of disease or other pestilence.

III.

THE WASTE IMPORTATION RESTRICTIONS FAIL THE STRICT SCRUTINY TEST.

It is clear from the foregoing that the Waste Importation Restrictions discriminate against interstate commerce and that, notwithstanding the Respondents' attempts to defend such discrimination, the Waste Importation Restrictions are not subject to any applicable exception to

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[28] As noted in the Brief of the Environmental Transportation Association as *Amicus Curiae* in Support of Petitioner's Petition for a Writ of *Certiorari* at 7, the administrators of the Federal Environmental Protection Agency have expressed their opposition to parochial efforts to interfere with the movement of waste in interstate commerce since such interference would inhibit and restrict development of the most appropriate technology for waste treatment or recycling and would prevent the free market from operating to ensure that cost-effective waste management options are available to all.

the strict scrutiny test. Accordingly, the Waste Importation Restrictions cannot stand unless the State has sustained its burden of demonstrating both that (i) the Waste Discrimination Restrictions serve a legitimate local purpose, and (ii) that this purpose could not be served as well by available nondiscriminatory means. *Maine* v. *Taylor*, 477 U.S. 131, 138.

A. The Waste Importation Restrictions Do Not Serve a Legitimate Local Purpose

Respondents have defended the Waste Importation Restrictions on the ground that the embargo upon out-of-state waste is necessary to conserve landfill space and to plan for the future landfill needs of the State and its counties. While that defense does not justify the adoption of the Waste Importation Restrictions, since the State cannot use an illegitimate means to achieve an arguably legitimate end, it does demonstrate that the Waste Importation Restrictions were *designed* to impose an embargo upon out-of-state waste for the benefit of the citizens of each of Michigan's counties, including St. Clair County, which did not choose affirmatively to allow the disposal of out-of-state waste in such county. As a consequence, it is clear that the Waste Importation Restrictions amount to simple "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors," *New Energy Co. of Indiana* v. *Limbach*, 486 U.S. 269, 273 (1988), and they should, therefore, be struck down by the Court as violative of the virtual per se rule. *See Wyoming* v. *Oklahoma*, 60 U.S.L.W. 4119, 4124; *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 624.

Moreover, even if it were assumed that the Waste Importation Restrictions were not "designed to benefit in-state economic interests by burdening out-of-state com-

petitors," *New Energy Co. of Indiana* v. *Limbach*, 486 U.S. at 273, the State's asserted purpose of conserving its landfill space, because it is to be achieved through the constitutionally impermissible means of imposing a discriminatory embargo upon articles of commerce originating from its sister states, is inherently illegitimate.[29]

B. The State Has Failed To Sustain Its Burden of Demonstrating That Its Legislative Purpose Could Not Be Achieved By Available Nondiscriminatory Means

Even if the Waste Importation Restrictions were found to serve a "legitimate local purpose"—notwithstanding the fact that such purpose is to be achieved through a discriminatory embargo upon interstate commerce—the State has failed to sustain its burden of demonstrating that such

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[29] In *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1113 (1986), Professor Regan contends that the Court should only hold state acts to be unconstitutional under the Commerce Clause where it can be shown that they were motivated by a protectionist purpose. 84 Mich. L. Rev. at 1125-1143 (1986). However in the case of a discriminatory embargo or the like, Professor Regan would assume an impermissible purpose unless the state showed by "clear and convincing evidence" that its purpose was innocent. 84 Mich. L. Rev. at 1134-35. Moreover, in the particular case of a landfill, Professor Regan "stipulates" that a discriminatory embargo prohibiting the importation of foreign waste, such as that which was struck down in *City of Philadelphia* v. *New Jersey*, must have just such a protectionist purpose since (i) it is inconceivable that the legislature adopting such discriminatory legislation would not be motivated "to some degree" by the local protective benefits to be derived thereby, and (ii) such discriminatory legislation does not have a legitimate (or as he calls it, a "permissible") purpose (or, again in his words, a "federally cognizable benefit") because it seeks to achieve its purpose *"at the expense of foreigners specifically."* 84 Mich. L. Rev. at 1120-22. Accordingly, Professor Regan concludes that the discriminatory embargo upon the disposal of foreign waste at local landfills can be branded as unconstitutional without regard to the claimed legislative purpose. *See* 84 Mich. L. Rev. at 1122-23.

purpose could not be achieved by available nondiscriminatory means.

Nothing in the record suggests that Respondents have exhausted all alternative means of conserving landfill space, such as by reducing the flow of all solid waste into Michigan's landfills. *See City of Philadelphia* v. *New Jersey*, 437 U.S. at 626.[30] In this connection, it should be noted that neither the Michigan Solid Waste Management Act nor any other relevant Michigan law imposes any quantity restrictions upon the amount of solid waste which may be deposited in local private or public landfills by Michigan citizens, and none of such laws *requires* recycling or other types of resource recovery, incineration or alternative methods of waste reduction.[31] Furthermore, nothing in the record demonstrates that the State has not already provided for its citizens' needs by imposing an apparently permissable discriminatory embargo upon out-of-state waste at currently operating landfills through-

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[30] It is noteworthy that this Court held in *City of Philadelphia* v. *New Jersey* that the State of New Jersey had not satisfied the burden of demonstrating that its purported purpose in barring out-of-state waste could not be served as well by available nondiscriminatory means, since it could be assumed that the state had available the means of "slowing the flow of *all* waste into the State's remaining landfills . . . ." 427 U.S. at 626.

[31] Michigan has adopted limited purpose legislation which (i) prohibits the ultimate disposal of used lead acid batteries except at state-approved recycling or smelting facilities, Mich. Comp. Laws Ann. § 299.861-869 (1991 Supp.), (ii) prohibits the disposal of used oil except at state-designated collection facilities, Mich. Comp. Laws Ann. § 319.311-316 (1991 Supp.), and (iii) establishes a mandatory deposit and refund program applicable to beverage containers typically sold to consumers within the state, Mich. Comp. Laws Ann. § 445.571-576 (1991 Supp.). Also, pursuant to Section 18a of the Michigan Solid Waste Management Act, Mich. Comp. Laws Ann. § 299.418a (1991 Supp.), beginning in March 1995, an owner or operator of a landfill may not accept for disposal

[Footnote continued on following page]

out Michigan which are owned by the State or its counties.[32]

Similarly, nothing in the record shows that the imposition of a discriminatory embargo upon out-of-state waste is necessary to create additional landfill capacity. Moreover, nothing in the record would support a claim that the State or its counties could not, other than by reason of its citizens' disinterest in doing so, accommodate its citizens' landfill needs by permitting the establishment of new landfills. Indeed, if the State or its counties so desired, some of such new landfills could be owned by the State or its counties and could, therefore, be operated for the exclusive benefit of its citizens.

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solid waste which he knows or should know includes yard clippings from any source (such prohibition becoming applicable in March 1993 with respect to yard clippings generated or collected on land that is owned by counties, municipalities or state facilities). In addition, Michigan has enacted a "Waste Minimization Act", Mich. Comp. Laws Ann. §§ 299.731-740 (1991 Supp.), but that act merely created an "Office of Waste Reduction" which was charged with advising the Director of the Department of Natural Resources on methods of incorporating waste reduction goals within the Department's regulatory and permit programs and with making recommendations on the value of imposing statewide goals for waste reduction, minimum recycling standards and waste treatment standards. Michigan has also enacted a Waste Reduction Assistance Act, Mich. Comp. Laws Ann. §§ 299.751-765 (1991 Supp.) which created a "waste reduction assistance service" within the Michigan Department of Commerce. As its name indicates, that act is intended only to provide assistance to others in reducing the amount of waste generated.

[32] In light of this Court's decisions in *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980) and *White* v. *Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983), it seems clear that State or county-owned landfills in Michigan may, absent unusual circumstances, prohibit the disposal therein of out-of-state waste under the market participant exception to the strictures of the Commerce Clause.

CONCLUSION

For the reasons set forth herein, this Court should reverse the judgment of the Court of Appeals for the Sixth Circuit and declare the Waste Importation Restrictions to be unconstitutional under the Commerce Clause.

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APPENDIX

Summary of the Current Solid Waste Management Plan
for each of Michigan's Eighty-Three Counties

The following is a summary of the provisions of the solid waste management plans of each of the eighty-three counties in Michigan which relate to the importation of out-of-state waste. Such plans are, by definition, a part of the Michigan Solid Waste Management Plan. M.C.L. § 299.432(1). Where a county's plan is described as "silent as to out-of-state waste," such plan does not explicitly authorize the disposal of out-of-state waste therein (and therefore, pursuant to Michigan law (M.C.L. § 299.413a, M.C.L. § 299.430(2), out-of-state waste may not be disposed of in such county's landfills).

1. COUNTY: Alcona
   COMMENT: Silent as to out-of-state waste.

2. COUNTY: Alger
   COMMENT: Silent as to out-of-state waste.

3. COUNTY: Allegan
   COMMENT: Silent as to out-of-state waste.

4. COUNTY: Alpena
   COMMENT: Silent as to- out-of-state waste.

5. COUNTY: Antrim
   COMMENT: Silent as to out-of-state waste.

6. COUNTY: Arenac
   COMMENT: Silent as to out-of-state waste.

7. COUNTY: Baraga
   COMMENT: Silent as to out-of-state waste.

8. COUNTY: Barry

   COMMENT: Silent as to out-of-state waste.

9. COUNTY: Bay

   COMMENT: The plan states: "It is not the intent of the plan update to restrict out-of-county waste to the proposed facilities at the time of approval of this plan, but to continue to negotiate agreements so that when a solid waste facility is developed in Bay County, these agreements will be in place to detail where the waste stream may be generated from." The plan did not, however, authorize the importation of any out-of-state waste pursuant to the Waste Importation Restrictions.

10. COUNTY: Benzie

    COMMENT: Silent as to out-of-state waste.

11. COUNTY: Berrien

    COMMENT: 600 tons per week may be imported from Indiana. The plan is otherwise silent as to out-of-state waste.

12. COUNTY: Branch

    COMMENT: The plan indicates that county solid waste can go to out-of-state landfills, but is silent as to out-of-state waste being imported.

13. COUNTY: Calhoun

    COMMENT: Silent as to out-of-state waste.

14. COUNTY: Cass

COMMENT: The plan states that St. Joseph and Elkhart counties of Indiana "offer a full range of disposal alternatives that may prove viable. . . . After extensive questioning and deliberating, MDNR has interpreted that 'a facility in Indiana that is licensed by Indiana would be an acceptable disposal area under Act 641.'" V-22. The plan does not provide, however, for the importation of out-of-state waste.

15. COUNTY: Charlevoix

COMMENT: Silent as to out-of-state waste.

16. COUNTY: Cheboygan

COMMENT: Silent as to out-of-state waste.

17.

18.

19. COUNTY: Chippewa, Luce, and Mackinac (joint plan of all three counties)

COMMENT: The plan states: "Act 475 addresses the issue of waste importation and is meant to be a progressive step toward meeting environmental goals. In effect this bill will amend Act 641 to prohibit an owner or operator of a disposal area from accepting solid waste that was not generated within Michigan unless the owner had received written consent from the planning agency that the acceptance of

solid waste was consistent with the county Solid Waste Management Plan. *The Solid Waste Management Committee has stated that any importation of waste from outside the tri-county planning area is not consistent with this Solid Waste Management Plan. The approved plan does not authorize disposal of out of state waste or waste from outside the planning area in Chippewa County Landfills.*"

20. COUNTY: Clare

COMMENT: Silent as to out-of-state waste.

21. COUNTY: Clinton

COMMENT: Authorizes the importation of waste from certain Michigan counties but silent as to out-of-state waste.

22. COUNTY: Crawford

COMMENT: Silent as to out-of-state waste.

23. COUNTY: Delta

COMMENT: Silent as to out-of-state waste.

24. COUNTY: Dickinson

COMMENT: The plan states: "The importation of solid waste from other counties into Dickinson County is only allowed under two circumstances . . . [(a) describes when intrastate waste may be imported and] (b) Importa-

tion may occur when the Niagara of Wisconsin Paper Corporation transfers [waste] using transportation facilities located within their own property, from their mill in Niagara, Wisconsin, to their proposed new landfill, which is to be constructed in Township 38 North, Range 20 East, Section 13 of Breitung Township [Michigan]."

25. COUNTY: Eaton

COMMENT: Silent as to out-of-state waste.

26. COUNTY: Emmet

COMMENT: Authorizes the importation of waste from certain Michigan counties but silent as to out-of-state waste.

27. COUNTY: Genesee

COMMENT: The plan states: "The interstate shipments of solid waste are not considered in this planning report, as there is presently no out-of-state solid waste being delivered to the three (3) privately operated landfills in Genesee County. All outstate importation of solid waste will be handled in the same manner as out-county wastes. The private landfills must reserve space for in-county generated solid waste. The importation of solid wastes from other states or counties will be resolved by reciprocal agreements or litigation."

28. COUNTY: Gladwin

COMMENT: The plan provides: "However, it is emphasized that the potential service area for any solid waste facilities which are proposed in Gladwin County is limited to this designated planning area: Bay, Arenac, Iosco, Ogemaw, Roscommon, and Clare [all of which are Michigan counties]." The plan is silent as to out-of-state waste.

29. COUNTY: Gogebic

COMMENT: The plan states: "The Gogebic County Solid Waste Management Plan specifically authorizes the importation of waste from the following counties in Wisconsin: Iron County (65 Tons per Month), Vilas County (33 Tons per Month) and Ashland County (70 Tons per Month) . . . . Since the facility providing primary disposal capacity for Gogebic County is located in Ontonagon County, the Ontonagon County Solid Waste Management Plan will also have to specifically authorize the importation of solid waste from Gogebic County, and from Vilas, Ashland and Iron Counties in Wisconsin."

30. COUNTY: Grand Traverse

COMMENT: Silent as to out-of-state waste.

31. COUNTY: Gratiot

COMMENT: The plan provides: "It is the intent of this plan to only allow waste to enter Gratiot County from a county where there exists a reciprical [sic] agreement with Gratiot County." The plan identifies 15 Michigan counties with which Gratiot County has obtained (or has attempted to obtain) reciprocal agreements. The plan is silent as to out-of-state waste.

32. COUNTY: Hillsdale

COMMENT: Silent as to out-of-state waste.

33.

34. COUNTY: Houghton/Keweenaw (joint plan)

COMMENT: Silent as to out-of-state waste.

35. COUNTY: Huron

COMMENT: The plan states: "The committee further recognizes that implementation of these options will require the execution of intercounty agreements and *may* entail the importation of some quantity of waste from other counties for disposal at a facility in Huron County. However, the committee does not wish to specify either the content of those intercounty agreements or the counties with which those agreements will be negotiated. Therefore, the Solid Waste Management Plan for Huron County

officially recognizes all counties identified in properly executed inter-county agreements . . . and confers upon them all rights and privileges specified in those agreements. The committee also wishes to emphasize that Huron County does not intend to allow the disposal of wastes generated or processed in states other than Michigan in any disposal facility located within its borders."

36. COUNTY: Ionia

COMMENT: The plan states: "Before Ionia County will accept solid waste from outside of Michigan, the Ionia County Planning Commission (ICPC) must review all proposals. The ICPC has the authority to declare the out-of-state waste either consistent or inconsistent with Ionia County's Solid Waste Management Plan. Consistency with the Plan will be based on Ionia County's continued ability to plan for future disposal needs, whereas inconsistency will result when the increased volume of waste causes Ionia County to be unable to plan for future disposal needs. If the proposal is declared consistent, the out-of-state waste may be disposed of in Ionia County, subject to the disposal area operator's approval. If the proposal is declared inconsistent to the Plan

by the ICPC, the solid waste may not be disposed of in Ionia County."

37. COUNTY: Iosco

COMMENT: The plan states: "When and if a new disposal area is proposed in Iosco County, the county will also pursue intercounty agreements for the acceptance of out-of-county waste." Also states that "[a]ll out-of-county waste must be treated in a consistent manner. Importation of waste is permitted only from those sources explicitly authorized in the Plan." Since the plan does not explicitly authorize the importation of any out-of-state waste, no such importation is permitted.

38. COUNTY: Ingham

COMMENT: Silent as to out-of-state waste.

39. COUNTY: Iron

COMMENT: Silent as to out-of-state waste.

40. COUNTY: Isabella

COMMENT: The plan provides "Therefore, for the short term, Isabella County will restrict disposal of waste at the landfill to that generated within the County. . . . The County recognizes that in certain cases the County may desire to allow the short term disposal of waste generated in an ad-

jacent county, on a case by case basis." The plan is silent as to out-of-state waste.

41. COUNTY: Jackson

COMMENT: The plan permits solid waste to enter the County if the County's waste-to-energy incinerator requires additional fuel for efficient operation. In such a case, Jackson County will request proposals from other counties. The Jackson County Board of Public Works then reviews the proposals and enters into an Intercounty Transfer of Solid Waste Agreement with the selected source. The plan does not, however, authorize the importation of any out-of-state waste pursuant to the Waste Importation Restrictions.

42. COUNTY: Kalamazoo

COMMENT: The plan provides: "Because we are concerned about both rarity of good sites and the dangers of improper disposal in them, we recommend: (1) No out-of-state wastes should be allowed in any in-county landfill. . . . As a condition of this document, only solid waste from those counties which have reciprocal agreements with Kalamazoo County will be permitted to be imported into this County." Appendix F of the update

identifies six Michigan counties that have inter-county transfer agreements with Kalamazoo County.

43. COUNTY: Kalkaska

COMMENT: Silent as to out-of-state waste.

44. COUNTY: Kent

COMMENT: The plan specifies those in-state counties with which Kent County had reciprocal agreements to transfer wastes. It also states: "For the first five years of this Plan, no other city, county, state, or country will be allowed emergency disposal of solid waste in Kent County solid waste disposal facilities."

45. COUNTY: Lake

COMMENT: Silent as to out-of-state waste.

46. COUNTY: Lapeer

COMMENT: The plan states: "In no event shall any solid waste be disposed of in Lapeer County which originates in any county other than those permitted pursuant to the authorizations specified above. In no event shall solid waste which originates outside the State of Michigan be disposed of in Lapeer County."

47. COUNTY: Leelanau

COMMENT: Silent as to out-of-state waste.

48. COUNTY: Lenawee

COMMENT: The plan identifies Lucas and Fulton counties in Ohio as counties that have secondary priority (behind Lenawee County) to dispose of wastes in Lenawee County. The plan also bars the disposal of solid waste from anywhere outside of an eight-county market area which includes Lenawee, Lucas, Fulton and five other Michigan counties, unless the plan is amended.

49. COUNTY: Livingston

COMMENT: Silent as to out-of-state waste.

50. COUNTY: Macomb

COMMENT: Silent as to out-of-state waste.

51. COUNTY: Manistee

COMMENT: The plan summary states that the county intends to provide "standby 'disposal capacity' to other counties in return for Manistee County being able to depend on facilities in their county [sic] as standby for Manistee." The plan also states that if a Manistee County landfill closes, the county will "[c]ancel all existing understandings with other counties that Manistee County facilities will be a standby to take their wastes." The plan goes on to provide that as county policy, Manistee County will

"offer to the same counties, PCA, and all adjacent counties" an agreement to take those sources' waste under certain circumstances. The plan does not, however, authorize the importation of any out-of-state waste pursuant to the Waste Importation Restrictions.

52. COUNTY: Marquette

COMMENT: Silent as to out-of-state waste.

53. COUNTY: Mason

COMMENT: Silent as to out-of-state waste.

54. COUNTY: Mecosta

COMMENT: Silent as to out-of-state waste.

55. COUNTY: Menominee

COMMENT: The plan states: "the disposal of Menominee County solid waste [is authorized] at licensed facilities in Wisconsin Counties." The plan also authorizes the importation of waste into Menominee County from Florence and Marinette Counties in Wisconsin as long as relevant Wisconsin and Michigan laws governing waste reduction, reuse, recycling and composting are met. The plan also provides for the exportation of Menominee County waste to Wisconsin facilities under the plan's contingency planning section.

56. COUNTY: Midland

COMMENT: Silent as to out-of-state waste.

57. COUNTY: Missaukee

COMMENT: Silent as to out-of-state waste.

58. COUNTY: Monroe

COMMENT: The plan identifies four landfills that accept waste from Monroe County: (1) Hoffman Road Landfill; (2) Evergreen Landfill; (3) Wood County Landfill; and (4) BFI Landfill. Also states that in the event of an emergency, Monroe County shall be able to use any of the four Ohio landfills listed above. Also identifies Lucas County, Ohio as a county with which Monroe County may import or export Type II or Type III waste.

59. COUNTY: Montcalm

COMMENT: The plan provides: "For that reason, to the maximum extent permitted by State and Federal law, the disposal of solid waste generated outside the above mentioned nine-county region [entirely within Michigan] shall be permitted only when the sending county has entered into a written agreement with Montcalm County which clearly specifies the quantities to be disposed and the duration of time for which the facility will be

utilized." The plan is silent as to out-of-state waste.

60. COUNTY: Montmorency

COMMENT: Silent as to out-of-state waste.

61. COUNTY: Muskegon

COMMENT: Silent as to out-of-state waste.

62. COUNTY: Newaygo

COMMENT: The plan sets forth both a short-term plan and a long-term plan for the county's solid waste management. The short-term plan is silent as to out-of-state waste. The long-term plan is to be part of a multi-county resource recovery facility with a landfill in Newaygo County. The other counties to be part of such facility are not specified. The plan does not, however, authorize the importation of any out-of-state waste pursuant to the Waste Importation Restrictions.

63. COUNTY: Oakland

COMMENT: Silent as to out-of-state waste.

64. COUNTY: Oceana

COMMENT: Silent as to out-of-state waste.

65. COUNTY: Ogemaw

COMMENT: Silent as to out-of-state waste.

66. COUNTY: Ontonagon
COMMENT: The plan states: "This facility is allowed . . . to accept waste from anywhere in the State of Michigan and Wisconsin so long as all applicable laws are adhered to."

67. COUNTY: Osceola
COMMENT: The plan prevents any importation of out-of-county waste, unless the sending county enters into a contract with Osceola County.

68. COUNTY: Oscoda
COMMENT: Silent as to out-of-state waste.

69. COUNTY: Otsego
COMMENT: Silent as to out-of-state waste.

70. COUNTY: Ottawa
COMMENT: The plan: "prohibits for disposal in [Ottawa County] landfills . . . those wastes generated outside the service area defined in the plan [four Michigan counties plus Ottawa County] unless the Plan is amended to specifically allow the acceptance of such wastes." The plan otherwise is silent as to out-of-state waste.

71. COUNTY: Presque Isle
COMMENT: Silent as to out-of-state waste.

72. COUNTY: Roscommon
COMMENT: Silent as to out-of-state waste.

73. COUNTY: Saginaw
COMMENT: Silent as to out-of-state waste.

74. COUNTY: Sanilac
COMMENT: Silent as to out-of-state waste.

75. COUNTY: Schoolcraft
COMMENT: Silent as to out-of-state waste.

76. COUNTY: Shiawassee
COMMENT: Silent as to out-of-state waste.

77. COUNTY: St. Clair
COMMENT: The plan states: "This plan limits transport of waste into St. Clair County to contingency circumstances and to fly ash for Detroit Edison. The restriction is consistent with the State Solid Waste Policy which discourages reliance on sanitary landfilling to solve solid waste needs. . . . The County's landfill capacity is needed for contingency and emergency circumstances." In the event of an emergency, the plan states: "While the County Plan does not permit the disposal of waste generated in another county to be disposed of in St. Clair County on a regular basis, there is receptivity to agreements for disposing of out-county waste on an emergency basis."

78. COUNTY: St. Joseph

COMMENT: The plan states: "Solid waste is also currently transported to Westside Landfill from Cass, Branch, Van Buren, LaGrance (IN) and Elkhart (IN) Counties." It continues: "The amount, if any, allowed to be brought into St. Joseph County in the future from surrounding Michigan counties is controlled by inter-county agreements incorporated into this document. These inter-county agreements also specify certain terms and conditions. In the absence of an inter-county agreement, a Michigan county is not legally eligible to have their solid waste transported into St. Joseph County. Michigan law does not currently address importation of waste from out of state." In the contingency part of the plan, the plan states: "St. Joseph County has authorized in this Plan that the County's designated solid waste planning agency shall make one or more contingency agreement(s) with other Michigan county(ies) and/or other units of government outside of Michigan."

79. COUNTY: Tuscola

COMMENT: The plan states that the County does not wish to accept out-of-state waste.

80. COUNTY: Van Buren

COMMENT: The plan provides for the importation of solid waste from other Michigan counties, but not for the importation of out-of-state waste.

81. COUNTY: Washtenaw

COMMENT: The plan provides a mechanism by which the county's municipalities, either in groups or individually, negotiate contracts with: (1) in-county landfills; (2) out-of-county landfills; and (3) other counties to assure the municipality or group disposal capacity. "If satisfactory contracts cannot be secured within one year," the county board may: ban all solid waste from entering the county; impose a flexible or graduated ban on certain solid waste from certain counties and impose fines on waste imported in violation of these bans. The plan does not, however, authorize the importation of any out-of-state waste pursuant to the Waste Importation Restrictions.

82. COUNTY: Wayne

COMMENT: The plan permits solid waste to enter the county provided a landfill operator in Wayne County has sought and obtained an import permit from the Wayne County Department of Public Services. The plan

lists nine criteria to be considered, at a minimum, in deciding on a permit application. These criteria primarily relate to the risks posed by the waste, its impact on the County's disposal capacity and the operator's compliance with state and county laws and regulations. Two additional criteria are: (1) that the sending county must accept Wayne County waste on terms that are no more restrictive than Wayne County's; and (2) if the waste was collected by or on behalf of a "municipal jurisdiction or public instrumentality, [there must be] a finding that the jurisdiction or instrumentality is in compliance with the Plan." The plan does not, however, authorize the importation of any out-of-state waste pursuant to the Waste Importation Restrictions.

83. COUNTY: Wexford

COMMENT: Silent as to out-of-state waste.